

Employee Benefit Plan Review

Paid Sick Leave in New York: City Amends Its Law and State Issues FAQs

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New York State's Paid Sick Leave law ("NYSPSL") took effect on September 30, 2020. On October 20, 2020, the state published a webpage¹ and FAQs² regarding this new law. While helpful, the law still remains somewhat ambiguous. For example, it is unclear whether there will be a policy requirement at some point under the law, and other portions of the law remain unaddressed or undefined in this guidance, such as what the regulation contemplates by the term "confidential information." (However, New York has issued proposed regulations which, if adopted, will address some of the remaining ambiguities, such as the definition of confidential information.)

Some issues the FAQs address include:

- Defining the terms "family member" and "calendar year."
- Clarifying that accrual does not occur during "non-working time."
- Explaining certain telework questions, such as accrual for time worked while in New York State (including telework).
- Explaining that employees paid different rates of pay must be paid for leave under the law at the "weighted average" of those rates.
- Providing an alternative accrual system of front-loading time for part-time employees.
- Clarifying that an employee may only use sick leave during paid family leave if the employer allows it.
- NYSPSL is in addition to any other state and/or federal leave requirements.
- Reiterating there is no specific notice period for the employee to notify the employer of the employee's intent to use leave.

Meanwhile, only days before NYSPSL's enactment, on September 28, 2020, New York City amended its own Earned Sick and Safe Time Act ("ESSTA") yet again, also effective September 30, 2020. On its face, the new amendment seems to closely conform with many portions of the NYSPSL.

The new ESSTA provides that:

- Employers with four or fewer employees and a net income of \$1 million or more in the previous tax year must provide paid safe/sick leave.
- Employers with four or fewer employees with a net income below \$1 million can continue to provide unpaid safe/sick leave.
- Employers with 100 or more employees now must provide up to 56 hours of safe/sick leave (expanding the carry over provisions to 56 hours per year for these employers).

- Eligibility is expanded for employees, as certain previous requirements are now eliminated.
- The previous “waiting period” was eliminated, i.e., employees are no longer required to work for 80 or more hours, or be employed for any length of time prior to using leave, but employers are not required to provide the increased benefit (i.e., hours beyond 40 hours) until January 1, 2021.
- Employers are now required to reimburse employees for costs incurred in obtaining documentation requested (such as healthcare provider documentation, police report(s) or court records).
- The amount of safe/sick time accrued/used during the pay period and the total balance of accrued safe/sick time must be included on the employee’s paystub or on a separate writing provided to employees each pay period.
- Notice of rights had to be posted (with the existing notice of rights updated) by January 1, 2021. New employees must be provided notice at the commencement of employment.

Anti-retaliation language is expanded in the ESSTA to include prohibited adverse actions, i.e., threats, intimidation, discipline, discharge, demotion, suspension, harassment, discrimination, reduction in hours or pay, informing another employer of an employee’s exercise of rights, blacklisting or maintaining an absence control policy that counts protected safe/sick leave as an absence that may lead to an adverse action. Employees do not need to reference the law to be protected, and the violation of these provision can be established when protected activity is a motivating factor for the adverse action, even if other factors also motivated the adverse action. The law also specifically states that adverse actions include actions

related to perceived immigration status or work authorization.

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In addition, the new ESSTA includes a provision contemplating the guidance on the NYSPSL and allows for it to set a higher standard than the provisions of the ESSTA, which the ESSTA will then incorporate by reference. Finally, the amended law also provides expanded investigatory and enforcement powers, with penalties on a per employee basis.

WHAT ARE SOME DIFFERENCES BETWEEN THE ESSTA AND THE NYSPSL?

The NYSPSL prohibits disclosure of confidential information relating to a mental or physical illness, injury or health condition of such employee or such employee’s family member, or information relating to absence from work due to domestic violence, a sexual offense, stalking or human trafficking, as a condition

of providing sick leave. This differs slightly from the ESSTA, which prohibits an employer from requiring disclosure of details relating to an employee’s/family member’s status as a victim of domestic violence, family offenses, sexual offenses, stalking or human trafficking.

The amount of time employers are required to retain records under the two laws also differs, with the NYSPSL requiring six years versus the ESSTA’s three-year requirement.

The NYSPSL requires employers provide a summary of accrued/used leave to employees within three business days of the employee’s request. The ESSTA has no such requirement, but does require employers to include the amount of safe/sick time accrued/used leave during each employee’s pay period and the total balance of accrued safe/sick time on the employee’s paystub or on a separate writing provided to employees each pay period (effective September 30, 2020, but a good faith extension for those trying to comply with implementation was given until January 1, 2021).

The ESSTA further diverges from the NYSPSL in the following ways:

- Benefits (up to 40 hours), if already accrued, can be used now;
- Employers are allowed to require employees to provide reasonable notice of leave when foreseeable;
- Employers are required to reimburse employees for fees incurred by employees in obtaining such documentation related to leave;
- Employers must provide new employees with notice of employee rights³ for safe and sick time at the start of their employment; for current employees, notice had to be provided within 30 days of the effective date (but was further extended by New York City until January 1, 2021); and
- Retaliation provisions are more detailed than in the NYSPSL.

WHAT THIS MEANS FOR EMPLOYERS

While the law has already taken effect and time has begun to accrue, New York City employers had to provide the additional benefit under the amended ESSTA January 1, 2021 (and likewise, non-New York City employees can begin using leave January 1, 2021). However, employers had to provide notice and should review and update their policies and employee paystubs immediately, if they have not done so.

While New York State has finally published some guidance, it is possible that the guidance will be

amended to incorporate additional questions and scenarios as businesses take steps to comply with this new law. Additionally, while New York City previously published vast guidance and helpful FAQs⁴ related to understanding the ESSTA, such guidance was further updated on November 2, 2020 to address the changes to the law. 🌐

NOTES

1. <https://www.ny.gov/new-york-paid-sick-leave/new-york-paid-sick-leave#amount-of-leave>.
2. https://www.ny.gov/sites/my.gov/files/atoms/files/PSL_FAQ_PaidSickLeaveFAQ.pdf.
3. <https://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSafeSickLeave-MandatoryNotice-English.pdf>.

4. <https://www1.nyc.gov/assets/dca/downloads/pdf/about/PaidSickLeave-FAQs.pdf>.

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